STATEMENT OF R. BLAIR STRONG
OPPOSING ~~HB~~ SB 377

Mr. Chairman, Members of the Committee: My name is Blair Strong, and I am presenting a statement opposing Senate Bill 377.

I am a graduate of the University of Montana Law School and an attorney admitted to practice in Montana. I live and work out of Spokane, Washington. For about twenty years, I have represented Avista Corporation in water rights matters in Montana. The firm in which I am a partner has represented many clients, including ranchers and farmers, mining and manufacturing companies and public agencies in water right related matters throughout the Northwest.

Avista Corporation's experience in the Montana Water rights arena dates back over fifty years when Avista, then known as the Washington Water Power Company, obtained licenses to build the Cabinet Gorge and the Noxon Rapids developments on the Clark Fork River. These two dams and other related property are now grouped under one federal license known as the Clark Fork Project. The Clark Fork Project incorporates the Noxon Dam in Sanders County, Montana and the Cabinet Gorge Dam which is immediately downstream on the Idaho side of the border.

Avista Corporation obtained water rights as have other hydroelectric, irrigation, domestic, industrial and municipal water users.

For instance, its earliest water right for the Noxon Dam is a filed right, dated February 20, 1951. It relates back to the date that Avista posted a notice and filed a notice with the Sanders County Clerk and Recorder of its intention to divert and put to use through its generators 35,000 c.f.s. from the Clark Fork River. Its next right for Noxon is a use right that dates from

April 3, 1959. There is nothing unusual about these rights. The same procedures and practices were observed with respect to these rights as applied to thousands of other historical water rights in Montana that were obtained before July 1, 1973. The law applicable to water rights after July 1, 1973 was changed by the Legislature, and new water right applicants now have to apply to the Department of Natural Resources and Conservation for water right permits. When the Noxon Dam increased its generation capability in the 1970's, Avista applied for and obtained a permit for the additional water required for that purpose. Throughout its fifty year history of doing business in Montana, Avista has observed the water rights laws, just like any other water user. Because of its high profile, Avista's water rights have been well known to the State, and in particular DNRC.

Nearly twenty years ago, the Montana Water Court conducted an evidentiary hearing on Avista's pre-1973 water rights, and Water Judge Holter issued an order that set forth those rights. Although the State of Montana did not formally intervene in Avista's hearing before the Water Court, personnel from DNRC were present in the court room when Avista presented its case as to the extent and nature of its rights.

SB 377 would change the rules in which the adjudication is conducted, but that change would only apply to Avista and other hydroelectric users. SB 377, would not apply to other types of water users and water rights. I recommend that you not pass SB 377, because there are several problems with the bill:

1. SB 377 impermissibly separates out for special treatment one type of claim, water rights associated with hydroelectric projects held by non-governmental entities of greater than 250 c.f.s. Why is this bill not equally concerned with water rights associated with governmental entities –

for instance, Hungry Horse, Libby, Ft Peck or Yellowtail dams? Why is it not concerned with all industrial uses of water greater than 250 c.f.s.?

The fact is that SB 377 would create a special class of water right, which is subject to its own special process for adjudication in the Water Court. In so doing, the bill may violate basic principles of equal protection of the law. The 1972 Montana Constitution "confirmed" existing Water Rights, and created no priorities between types of rights. The 1889 Montana Constitution also gave no priority to types of water uses – all types of water use were considered equal in the eyes of Montana law. Montana should not depart from these principles through SB 377.

There is no rational and constitutional distinction between uses of water for power generation purposes and uses of water for other purposes, such as manufacturing or industry. Therefore by treating power generation water users differently from other water right users, SB 377 would deny power generation water users of their right to the equal protection of the law, and thereby violate the Montana and the United States Constitutions.

2. There is no need for SB 377. The use of water at Avista's projects is well known and far better documented than most water rights, because Avista is a regulated utility, and has a lot of accountability to state regulators who establish Avista's retail rates, and the federal government, which licenses Avista's projects. Avista's right are measured by the capacity of its turbine generators and the size of its reservoirs.

In the adjudication process, DNRC reviews claims and attaches issue remarks to problem claims. The Water Court is required to review claims with issue remarks. The DNRC review process, the process of water users objecting to competing water uses, and the Water Court adjudication process are adequate to deal with other large water right claims, whether

privately or government owned. There simply is no need to establish an constitutionally questionable process that pertains only to privately owned hydroelectric rights to review these rights. I recommend that the committee vote against the bill. Thank-you.